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IN THE

Supreme Court of the United States.

THE UNITED STATES..... *Appellant,*

v.

THE DETROIT TIMBER AND LUMBER COMPANY ET AL. ..... *Appellees.*

STATEMENT AND BRIEF FOR APPELLEES.

THOMAS C. McRAE,
JAMES F. READ,
U. M. ROSE,
GEORGE B. ROSE.

Central Printing Company, Little Rock, Ark.

IN THE

Supreme Court of the United States.

THE UNITED STATES.....*Appellant,*

v. No. 389.

THE DETROIT TIMBER AND LUMBER COMPANY ET AL. .....*Appellees.*

STATEMENT AND BRIEF FOR APPELLEES.

I.

The assignment of errors presents for the consideration of this court two distinct questions. The first challenges the bona fides of the entries; the second, the bona fides of the purchase by the Detroit Timber and Lumber Company. The case affecting them will be stated, and they will be argued separately, and in the order above set out.

The assignment of error bearing upon the first question is as follows:

"The court erred in refusing to hold that, prior to the entries made at the United States Land Office at Camden, Arkansas, by defendants, * * * an agreement was entered into by and between each and every of said entrymen, and entrywomen, and their codefendant, the Martin-Alexander Lumber Company, that the entry made by each of them respectively, should be made for the benefit of the Martin-Alexander Lumber Company in order that it might obtain the timber growing on the lands covered by said entries.

We have not been furnished with a brief for the appellant, and are therefore unable to forecast what statements will be made by counsel in this court, but presume they will follow the same general course as was pursued by counsel before the circuit court of appeals.

It was said in appellant's brief before the court that forty-one of the entrymen signed timber contracts within two or three days after their final proof was made. The evidence does not show that all the contracts were signed within a month.

It was said that Copeland selected each tract for the entrymen. With respect to many of the entries there is no proof on this subject; but there is proof that some of the entrymen selected their own lands (Rec., 100).

It was also said that the entryman Jones had prior to his entry seen blank timber contracts, but his

statement is that he never read one, until the day he signed the one made by him (Rec., 101, 103).

The testimony of Copeland as set out by appellant in circuit court of appeals was taken from an affidavit prepared by an agent of the land department, and signed by Copeland. While the statements in it are not controverted by him, his testimony upon the witness stand is much fuller, clearer and more intelligible. From this it appears: He was born in Arkansas 66 years ago; lived there continuously except four years spent in the Confederate army. He had lived in Pike County thirty-six years. Had been a farmer all his life; had preached for thirty-odd years and had done a real estate business. Had served four years as sheriff and collector of Pike county, two years as representative and four years as senator in the legislature. In 1887 he represented the Michigan Lumber Company in locating and surveying its lands. In 1894 and 1895 he was the agent of the Iron Mountain Railway lands. Was familiar with lands in Pike county and had a plat of all government lands. Persons who came there wanting to buy lands invariably came to him. Met Alexander in the spring of 1897. Had done some work for him before Martin became interested with him. At Alexander's request he showed Martin over the private timber lands near the mill. He had 700 acres bought in a body, and a considerable amount that witness had bought. Martin took an interest, the Martin-Alexander

Lumber Company was formed, and witness engaged part of his time to serve them in the timber business. When Pike City was established he laid out the town and opened a real estate office in the first house built. First heard of the Timber and Stone Act in the spring of 1889. Wrote his congressman, T. C. McRae, and got a copy of the act. Soon afterward, while passing through Camden on other business, he went to the land office and was introduced to the register, whom he did not know, by the former register, whom he knew well. He explained that he wished to learn the proper construction of the act, as he wished to be very careful not to violate the law. They sat down and went over the law thoroughly, particularly the oath required. They examined carefully the application and proof. On his return home, he told some citizens of that law, what it was, and the construction of it by the land office, and that they could take 160 acres under it. These men told him they would like to take up land under it, if they had the money. Some time after that in talking with Martin he told him of this act, of his construction of it and of the construction of the officers of the land office. Perhaps the next day he took the act to Martin, and they, with Alexander, went over it. He told them that they were good, honest reliable men who had told him they would take up land under the act if they had the money. Martin said if witness knew them to be honest and reliable he would lend them

the money, on notes, at 8 per cent without security. That was the first conversation ever had with Martin or Alexander about the Timber and Stone Act. The men he referred to were those that he had talked to, three of whom he names, and the others he does not remember. Just before this a line had been surveyed for a railroad from Pike City through Caddo Gap, which would run through this land and his own, and he believed the entries would be profitable to the entrymen and he wished to see them get the benefit. They all understood very fully that no contract could be made with regard to the land. He then went to the men who had expressed a desire to take the land, and told them the Martin-Alexander Lumber Company would lend them the money to buy the land on their notes at 8 per cent without security. They said they would take it. Nothing had been said about how the expenses would be paid. When the first trip was made to Camden he paid the expenses out of moneys in his possession belonging to the Martin-Alexander Lumber Company, and on his return reported it. Martin said it would be charged to the accounts of the parties. On subsequent trips he usually asked for expense money, and got it with the understanding that it would be charged to the accounts of the respective entrymen. After the first notices were published there was a good deal of talk about it, and numbers of men came to him and asked him to explain the law, which he did.

The pay roll of the company ran at times from two hundred to three hundred men. At times most everybody in the country worked for the company. Many people came to make inquiries of him about it. He declined to recommend for loans many more people than he recommended. He did not hunt up men to take lands; as a rule, they hunted him up. He did not approach Moran on the subject or recommend him. He never asked an entryman for his receipt. Such as he took were given him for safe keeping, because, as he supposed, he had a drawer in the safe. He never had an agreement or understanding, or knew of one, with any entrymen before he completed his entry, to the effect that his entry was made for the benefit of the Martin-Alexander Lumber Company, or that he was to convey the land or an interest in it, or the timber on it, to the Martin-Alexander Lumber Company. He did not state to the entryman Colston that the agreement prohibited by the act was a written agreement. He knew better. Knew that it applied to everything that might imply an agreement. After the entries were complete he approached the entrymen to buy their timber just as he did other owners of timber, and told them that if they executed the contracts their notes would be canceled. He paid the entrymen just what he paid all others for timber (Rec., 322, 373).

A. V. ALEXANDER, in an affidavit made at the request of the agent of the land department, corrobo-

rated Copeland, as to the origin of the entries (Rec., 62). Upon his examination in this case, when questioned as to his understanding of the provisions of the Timber and Stone Act, he said, "We knew the provisions of the law thoroughly—we knew we could make no agreement of any kind or character with the men as regards the lands or timber.' That they never made any agreement or arrangement with any party, "direct or inferred," before he received his final certificate (Rec., 404). After they had gotten their final receipts he asked the Morans and Dorsey if they cared to sell their timber. They said they were not wanting to sell, and he later asked them for notes and told them they could sell their land or timber to whoever they pleased; that all he wanted was notes, which could be renewed if not paid at maturity (Rec., 405). He gave as reasons for making the loans that he knew the lands were worth the money. If the entrymen held their lands he could make his loans out of them; if they sold them, and were honest, as they were represented to be, they would pay the loans. And when the lands passed to other owners they had as good a chance to buy the timber as anyone else (Rec., 415). No matter who the entrymen sold to, it would some day be in the market for sale (Rec., 416). The fact that lands were held by private owners would be an advantage in disposing of the mill plant (Rec., 421).

With respect to the origin of the entries and their bona fides, the testimony for the government contains the following showing:

HENRY JONES testified:

His attention was first directed to the matter by filing papers with reference to entries. He did not notice the papers particularly. They were bound together with a rubber band and he did not open them to read them. After his attention had been thus directed he spoke to Alexander, or Martin, or Copeland, he does not remember which, perhaps all of them, and told them if the matter was regular he would take pleasure in taking up 160 acres of land. They told him that it was regular (Rec., 88). There was no conversation as to how the money borrowed was to be repaid. He knew that the Martin-Alexander Lumber Company wanted timber, and in reason that he could sell his; but there was no conversation on that subject. There was no conversation about an agreement for the sale of the timber. Nothing said (Rec., 93). Four quarter sections were shown four parties. They cast lots for the first pick (Rec., 100). He never read but one timber contract. That was the one he copied his from the morning he signed it. He made several copies from the same. His answers to questions in his testimony as claimant before the register were true (Rec., 102).

GEORGE T. COLSTON testified:

That the matter of these entries first came to his attention through J. O. Means. This resulted in his going with Copeland to look at some land. He asked Copeland about the process of taking up land. Copeland told him that it could be taken up under the Timber and Stone Act, and that no contracts were made with anyone beforehand; that he could get money from whom he pleased, provided no contracts were made. When Copeland presented to him a timber contract he hesitated about signing it, and Copeland said if he did not want to sign it he could sell the timber to anybody he wanted to and return the money. That was all they wanted (Rec., 112, 113). His answers to questions in making the entry were read over to him, signed and sworn to by him, and were true. He said that he never had any conversation with Martin or Alexander, and that he had none with Copeland except the two conversations detailed (Rec., 116). And in the conversations detailed there is nothing that intimates or implies any agreement on his part to transfer any interest in the land or the timber on it until he signed the timber contract after getting his final receipt.

STEPHEN FULLER testified:

That his attention was called to the matter by seeing notices published in the paper. That he made inquiries first of one party and then of another, and

at last of "Brother" Copeland (Rec., 118, 119). That "everybody in the country went to him, mighty nigh, and put a great deal of confidence in him knowing about the land." That he had made no contract, promise or agreement of any kind to sell the land or any part of it, or the timber on it. That he was free legally and morally to sell the land or the timber to whoever he pleased, and would certainly have sold it to anybody who would have given him more than the Martin-Alexander Lumber Company. They gave him the usual price (Rec., 126, 127).

If the court will read the testimony of this simple, honest, candid old man it cannot doubt that his statement contains the truth, the whole truth, and nothing but the truth.

E. Y. FULLER testified:

That he heard that land could be taken up from different parties, among them Jim Copeland, who told him that he could take up the land under this act. Witness told him he would take it up if he could get the money. Copeland replied that he could get the money. Didn't say from whom. Copeland asked him to take his team and take some parties to see the land (Rec., 128).

He signed a timber contract, but before that time had made no contract or agreement to do it. Nothing had been said about it. He had a perfect right to sell it to anybody he saw fit, and would have sold it to any-

body else that offered him more. He knew before his entry that other people were making entries, but did not know that they were selling their timber (Rec., 131, 132).

THOMAS J. CLEMENTS testified:

He regarded his land as worth $1.00 an acre after the timber was cut. Has paid taxes on it. The timber would pay the money borrowed. Had borrowed money from Martin-Alexander Lumber Company before (Rec., 147, 148). The first conversation he ever had with Copeland with reference to the timber or the sale of any part of the land was after he had gotten his final receipt (Rec., 151).

EMMET KEEBAUGH testified:

That the matter was first brought to his attention by the fact that a number of people were making these entries. He made the entry because he understood that the land would be valuable for the timber and the land itself. They were worth more than the government price. He knew the entries were being made but did not know that the entrymen were selling to the company (Rec., 154). Copeland told him that the timber on the land was worth more than he would have to pay for it (Rec., 156). He signed a timber contract after he got his final receipt. That was the first contract, promise or agreement of any kind that he had made. He considered himself the owner of the land and that he had a right to do with it as he saw fit (Rec.,

158, 159). He thinks his final receipt was handed to Mr. Copeland. If so, it was merely for safe keeping and not the request of Copeland, Martin or Alexander.

CHARLES W. DAVIS testified:

That he made the entry because he expected to be benefited by it in that the land was worth more than he paid for it; that there had been no agreement or contract prior to his getting his final receipt about the sale of the timber or any part of the land. No conversation on the subject. He thought of this when he was asked the question in the land office in Camden, knew he had not done it, and answered in the affirmative. As far as any contract was concerned, directly or indirectly, he was at liberty to sell the timber to anybody else, and if anybody else had offered him more he would have taken it and paid off the loan. He expected to sell the timber and pay the loan, but he had no particular party in view that he expected to sell to. The Wooden Gutter Company had land near this and he thought he could sell it to someone and realize the benefit of it. Never settled on any particular party (Rec., 169, 170).

The court cannot read the testimony of this witness and question the perfect candor and truth of every statement he made.

R. C. GREGORY testified:

That he made his entry because he thought he could borrow the money, make an honest investment

that would pay him some money. He kept his final receipt until he sent it to Camden to get his patent. Up to the time he signed the timber contract he had made no contract with reference to the land. "This is the only contract or shadow of one that ever existed between me and anyone." That is the only thing that ever came up in the way of a proposition. He thought the land was his to do as he pleased with it, and would have sold it to the man that offered him the most money (Rec., 181, 182). At the time he made his entry he gave no particular thought as to how he would pay his loan (Rec., 184).

MARY A DAVIS testified:

J. P. Copeland told her she could borrow the money to make the entry. He did not tell her from whom she could borrow it. She thought she could sell the timber and pay the loan; but did not know at the time to whom she would sell. The only reason she had for entering the land was that she thought it would be a good investment for her. She had not made any promise or agreement of any kind prior to signing the timber contract (Rec., 189, 190).

ARCHIBALD G. WINSLOW testified:

Heard general conversation about the town and saw notice in the paper. Later went to Copeland and asked him for information (Rec., 194). Told him he could borrow the money but did not tell him from whom (Rec., 196). Prior to getting his final receipt

he had made no contract about the timber and there had been no talk about it. He still owns the land and pays taxes on it (Rec., 205). He expected to sell the timber and pay his loan. Had no expectation as to whom he would sell to, but he would sell for the best price he could get (Rec., 206).

WILLIAM F. WAITS testified:

That he took up the land because he was a poor man, had to work hard, thought the land was worth more than he paid for it, and that he could make something out of it. That he made the entry on his own motion, and acting for himself alone in the matter. He made no agreement or promise of any kind for a sale of the land or timber before he signed the timber contract, and would have sold it to the man that gave him the most for it. "Uncle Jim Copeland had entered land and I thought he knew right smart about it. We all went to Uncle Jim for advice. I did and others did, too" (Rec., 220).

LAWRENCE C. HORNE testified:

That he entered the land on his own motion because he thought there was profit in it. Until he signed the timber contract nothing had been said to him about giving a contract to any one for the timber or entering it for the benefit of the Martin-Alexander Lumber Company. There had been no reference to anything of that kind (Rec., p. 225).

JAMES F. PATTERSON testified:

Talked with Mr. Copeland. Told him would take up land if money could be gotten. He said he thought he could get the money, and nothing more definite was said. He sold the land to Mr. Elrod, of Pike City (Rec., p. 230). If he had not thought that the land was worth more than he paid for it he would not have bought it (Rec., p. 231). He made the entry for himself alone. He was under no obligation to anyone else. No one else was interested with him. He had made no contract, promise or agreement with reference to entering that land with the Martin-Alexander Lumber Company or to give them the timber on it. Nothing was ever said to him with reference to it; he was under no obligation to anybody, and was free to sell the timber to anybody he wanted to (Rec., p. 232).

CHARLES W. FULLER testified:

The matter was first brought to his attention by people in general taking up the land. When he went to look at the land he had made no arrangements for money, and Emmet Keebaugh told him that he would see that the money was furnished. He never spoke to Mr. Copeland about it or anybody else except Keebaugh (Rec., pp. 234, 235). Up to the time he got his final receipt he never had any other conversation about the matter, never made any promise, contract or agreement of any kind with anybody with reference to

the land, was under obligations to nobody about it, and there was no one interested in the matter but himself. He would have felt entirely free to make a contract with anybody else who would have paid him more for it (Rec., p. 238).

HENRY M. LINTZ testified:

Is a surveyor and selected his own land (Rec., p. 240). He never made any contract or agreement to sell the timber prior to the time he gave the timber contract. There had been no discussion of the matter. He was under no obligation, but at liberty to sell to whoever he pleased. He would have given he Martin-Alexander Lumber Company the preference at the same price, but certainly would have sold to somebody else at a better price, and they would have had no reason to complain (Rec., pp. 246, 247).

SEYBOURN Z. MORAN testified:

The statement contained in his application and proof before the register was true, literally and absolutely and without reservation. He had made no contract with respect to the land and no one else was interested in it except himself. The land was his, no one else had any claim on it, or interest in it, or in the timber on it (Rec., pp. 263, 264).

BILL DORSEY testified:

After he and Moran got their final receipts Alexader asked them to sign a note at Moran's house. He said he wanted some evidence of the debt. That the

parties could sell the land to anybody they wanted. He entered the land for his own benefit. Had made no promise, contract or agreement to sell it or any part of it or timber on it to anybody, and never did until he sold it to Brunson. He had not directly or indirectly made any agreement or contract by which the title was to inure in whole or in part to any person except himself (Rec., pp. 288, 289).

E. A. SHICKER, register of the land office at Camden, corrobates Copeland with respect to his visit to the land office, his inquiry as to the timber and stone act, and his apparent wish to be informed as to the law.

The evidence discloses about this state of case. A mill company being interested in having adjacent timber lands put on the market loaned to different persons the moneys necessary to enter them. The loans were made upon the faith of representations that the borrowers were honest and reliable and would acquire lands worth more than the loans. The entrymen were largely engaged in farming, but during the dull times on the farm worked for the mill company. The defendant Copeland, who was a preacher, a real estate agent and a farmer, who had held many elective offices of trust and confidence, and was the citizen of the county to whom the people, generally, looked for advice and guidance, but who was at the same time in the employ of the mill company aided the entrymen to make their

entries. Nothing was said to the entrymen, before perfecting their entries, by Copeland or anyone else, about selling the land entered, or any interest in it, or the timber on it, to the mill company. After the entries were perfected Copeland offered, for the mill company, to buy the timber on the land, at the ruling price, and the entrymen, except three, accepted the offer, the amount paid being sufficient in all cases to pay the loans, and in some cases more than sufficient. Prior to the times when such offers were made and accepted, no entrymen had made any promise, contract or agreement on the subject, nothing had been said about it, but each felt that he was the sole owner of the land entered by him, to do with as he pleased, and that he was entirely free to sell the timber to the mill company or to any other person as he saw fit.

Upon this state of case it is insisted by the government, (1) that there was an agreement between each of the entrymen and the mill company, made before the entries, that the entrymen would sell to the mill company the timber standing on their land; or (2) that the several entries were made upon speculation, and not in good faith to appropriate the land to the exclusive use and benefit of the entrymen.

If any of the witnesses are to be believed, the position taken is unfounded in fact; if none of them can be believed, the case of the government must fail for want of proof.

When the testimony is analyzed it will appear that there are but four facts relied on to establish the charges made.

1. That the mill company loaned the money to defray the expenses and pay for the land.

2. That Copeland rendered aid to the entrymen in perfecting their entries.

3. That the entrymen soon after perfecting their entries executed timber contracts to the mill company; and

4. That the entrymen were in the employ of the mill company.

If these facts stood alone, without explanation, they might excite suspicion, but neither of them, nor all of them, furnishes adequate legal proof of the charge made.

The loans tend to prove that the mill company wished to see the entries made. But the law permitted them to be made, and the parties who made them had the right to do it. There is nothing in the wish to indicate that the mill company preferred illegal to legal entries, and since they could be made according to law or contrary to law, there is a wise and charitable presumption that the latter was intended.

U. S. v. Budd, 144 U. S., 154, 163.

But the interest of the company points to the same conclusion. The loans were made upon the faith of the borrowers' integrity and the adequacy of the in-

vestment as security for the loan. If they respected the law, their loans were secured, and the lands would get upon the market. But if they violated the law, the entrymen subjected themselves to prosecution for perjury or fraud and their money and land were forfeited to the government. So the mill company would lose the moneys loaned, and the lands would not get on the market. This fact was well understood by Copeland, Martin and Alexander, before a loan was made, and self-interest if not honesty, would have dissuaded them from a course that meant a loss of money and failure to get the land on the market. The open, public and notorious method of doing the business shows that they were not hoping to cover their acts and the charges made are inconsistent with their ordinary intelligence or integrity.

The fact that Copeland assisted the parties indicates no unlawful design to benefit the mill company. He had rendered similar services to his neighbors in making entries for years, and the people looked to him in such matters. In these transactions he had the double incentive, to serve his neighbors and his employer. The basis of the credit in the loans made was the value of the land entered and the integrity of the entrymen. Regular entries were therfore essential to the interest of the borrower and the lender, and Copeland served both when he assisted the entrymen.

Legal sales of the timber subsequent to the entries

do not prove prior illegal contracts to sell. And haste of the mill company to procure contracts after the entries, would imply that they did not have them before. If the matter was already understood, why hurry to get a contract? It cannot be said that the company was seeking valid contracts for those that were invalid, because upon the assumption of the government no contract could be gotten that the mill company could afford to assert.

The fact that the entrymen consented to sell their timber does not prove a prior corrupt purpose, agreement or understanding. They sold the timber at the ruling price, for enough, or more than enough, to pay what they had borrowed, and they had clear the proceeds of the surplus timber, and the land. That they were willing to relieve themselves of their debts by a sale of the timber at its usual market price, in order that they might hold the land and enjoy the surplus proceeds of the timber, argues nothing wrong. And the fact that they made a sale when they could legally deal upon the subject, is no proof that they had a prior understanding about it, when the law prohibited it and they could not do it without committing the crimes of fraud and perjury, and forfeiting their money and claim to the land.

The fact that most of the entrymen were in the employ of the mill company at some time, signifies nothing. Some of them were not in its employ at all,

and most of them were so only during the dull seasons on their farms. Few of them depended upon the mill company for employment or support. Most of them engaged regularly in farming. That was their occupation and means of livelihood, while their employment at the mill was occasional and incidental only. They were not dependents of the company. Such men as Stephen A. Fuller, Davis, Lintz and Gregory are subservient to the commands of no employer, except in proper line of employment, and a reading of their testimony will satisfy this court that they acted as free men, in their own interest, and did the bidding of no one. They were in the employ of the mill company as almost every industrious farmer in that country was, but they were independent, self-reliant, free men, with no obligation to it outside the lines of their respective employments, and nothing to induce them to embark on a scheme of perjury and fraud to promote its interests.

So, we submit that the ultimate facts made out of the multitude of details and circumstances in proof, do not establish the charge made.

And we submit further that the charge is disproven.

First. By its inherent improbability and unreasonableness; and

Second. By the direct, positive and uncontradicted testimony of witnesses who knew what the facts were, and so detailed them as to disprove the charge.

1. The charge contains such inherent improbability and is so unreasonable that it cannot be credited without more proof than is furnished by the suspicious circumstances arrayed by the learned attorneys for the government.

It should be remembered that Martin, Alexander and Copeland were men of intelligence, who knew the law, and, that it forbade any agreements being made before the lands were entered, directly or indirectly, in any way or manner. They further knew that a part of the penalty, for violating the law was a forfeiture of the land. And a forfeiture of the land meant a loss of the money loaned, since the borrowers were recommended as honest but poor, and it further meant that the lands would not go upon the market, which was the alleged motive of the mill company. Is it reasonable or probable, that sensible men, actuated by the motive alleged, would adopt a course so foolish? If they did, their dishonesty is far exceeded by their stupidity.

If they respected the law, they might reasonably expect all their alleged plans to work out. The lands when entered would exceed in value the loans, and were subject to the debts. As the owners were honest they would pay the loans if they sold their land. If they did not sell, the lands would be subjected by legal process. In either event, the lands would become subject to sale on the market, and the relative situation

of the mill and the lands made it extremely probable that the mill company could acquire them sooner or later. If they violated the law the money was gone, no title to the lands would be acquired and no security would be obtained, and the lands would not go on the market. Such a course can be explained only on the theory that its authors were idiots or irresistibly bent upon crime.

The alleged course appears the more unreasonable since its assumes the willing, servile and unresisting participation in fraud and perjury of every entryman, including old Stephen Fuller, Davis, Lintz and others, whose language, though it is communicated to this court in cold type only, leaves no doubt of their honesty, truth and perfect candor. They are representatives of primitive conditions in society, rude perhaps, simple-hearted and improvident; but truthful, honest and self-respecting, who care too little for gain to countenance or practice wrong-dealing.

2. But the court is not called to determine the issue raised by the contention of the government, upon consideration of what may be deemed reasonable or probable.

The government produced, at the trial of the indictment against Copeland, Alexander and Martin, nearly all the entrymen. They testified fully, freely and without apparent reserve. They detailed the conversations between them and the parties named; stated

what their understadings and agreements were, what promises were made, and when they were made; what they did and why they did it; and by the testimony of each and every one of them, the alleged agreements and understandings were never made, the entries were made for the sole and exclusive benefit of the entrymen; they were under no obligation to the Martin-Alexander Lumber Company to sell it the land or timber, but felt free to sell to whom they pleased. This testimony, taken in open court, was reduced to writing, and by consent of counsel used in the trial of this case.

The learned judge who tried this cause in the circuit court heard the witnesses, saw what manner of men they were and how they conducted themselves, and his subsequent finding in this case was, that there was no violation of the law.

U. S. v. Detroit Timber and Lumber Co., 124 Fed., 393.

Under such circumstances his finding is entitled to great respect. There is certainly no judge of any court to whom fraud is more offensive, or who would more cheerfully apprehend its authors and take from them its ill-gained fruits. Nothing but a clear conviction that there was no fraud could ever bring him to the conclusion reached in this case. It is not a case in which he would readily decide for the defendant on the ground of evenly balanced doubts, or a failure to prove with sufficient directness a fact that he believed existed.

But if he had believed that the transactions were fraudulent he would have taken extreme delight in unmasking them, and tearing away any cloak by which it was sought to cover them. A hearing of the witesses, seeing them, coming to know what manner of men they were, satisfied him that there was no wrong, and his finding is sustained by the testimony of every witness who professed to know and detail the facts.

Every entryman examined said that he made no promise, contract or agreement until after he got his final receipt. That nothing was said on the subject. That he made the entry for himself only, because he thought the land was worth more than he paid for it. That he felt free to sell it, and would have sold it, to the person offering the most. And that he felt that he could have sold it to any other without violating any obligation to the Martin-Alexander Lumber Company. Moran and Dorsey, who seemed quite hostile to Martin, Alexander and Copeland, and who seemed to be the main reliance of the government, did not sustain the charges made, but on the contrary disproved everyone of them, so far as they knew, or were concerned. They not only denied any contract, agreement or understanding, directly or indirectly, but had declined to sell the timber to the company and later sold their land to another person.

So far as the entries of Moran and Dorsey are concerned, the proof shows there was no agreement to sell,

and that there was no sale to the company. Unless allegations outweigh counterproof, there can be nothing in the attack on them.

Old man Lintz and his wife still hold their land, though they sold the timber. This court cannot read his testimony and believe the charges of fraud made against him.

Old man Stephen Fuller has sold his timber and land and perhaps has little pecuniary interest in the case. But his good faith is the abundant protection to his vendee. We invite the court's attention, particularly, to the testimony of this unsophisticated, illiterate, good-natured, simple-hearted, honest old man. When fraud is found in his acts or falsehood in his words, men will gather figs on thorns and grapes on thistles. We might go over the list of the entrymen in the same way, but there would be but one result. Their testimony seems candid, truthful, unreserved, and convincing, and it all leads to the same conclusion, that the charge of the government is not sustained.

3. It is argued that if the entries were not made for the benefit of the Martin-Alexander Lumber Company, they were made for the purpose of speculation. What is intended by an entry "for the purpose of speculation" is not distinctly developed. If it is one made in the hope of selling at a profit the position is no doubt well taken and the entries are perfectly legiti-

mate. If it means more, there is no evidence to warrant it.

Each entryman who testified on the subject said that he expected to realize a profit by a sale of the land or timber, or both; but that he had no definite idea of when or how he would sell, and did not know, or have any defined purpose, as to who he would sell to. Lintz said he knew what the mill company was paying for timber, and supposed that he could sell to it at the prevailing price, though he had no intention of doing so, but intended to sell where he could get the most when the time came to make a sale. The others say that they never thought about when they would sell, or who they would sell to. The state of mind of the entrymen is well illustrated by the testimony of Gregory:

"Q. Was there any other way to pay it (his note)

"A. Not within six months.

"Q. If the note was within six months?

"A. I believe if it came to a showdown I could have borrowed the money over from other parties to pay that money off entirely, different from that company.

"Q. Did you expect to do that?

"A. No sir; I didn't expect to have to do anything of that kind.

"Q. Did you have any idea of how you were to pay that note at the time you executed it?

"A. I never gave that any particular thought. When I made a proposition that had been accepted, I thought that was all right.

"Q. You made a note for four hundred and some odd dollars, and your wife also made one for some four hundred dollars?

"A. I don't believe hers cost as much as mine, quite, because she only took one hundred and twenty acres.

"Q. Hers was three hundred and something?

"A. I don't remember whether it was or not.

"Q. Then, whatever it might have been, these two sums of money you had to pay?

"A. She and I together, because I had made out those notes, because I, being the head of the family, took it upon myself to consider the whole thing as one.

"Q. At the time you made them, or that they were made, you didn't know how they were to be met when they matured?

"A. No, sir; I didn't think that I would have to meet them at maturity, but I think I could have paid them off if it had been a plain case of showdown, and I couldn't have disposed of any of my timber. I believe I could have met them. I have not any particular assurance that I could have met them, but I believe I could" (Rec., p. 184).

This may indicate improvidence and loose business methods, but it does not show any purpose to enter land for the benefit of anyone else. And it should be remembered, that, while these entrymen were plain, honest, straightforward men, who knew right in the ordinary affairs of life and do it, they were not examples of thrift or strict business methods, and naturally took no concern for the money.

Buying for sale at a profit, could not have been what the act meant by speculation. As it applies only to land valuable for timber or stone, the entrymen could derive no benefit from the land except by selling it. Only a mill man could make the entry for the purpose of using the timber, and it would not be contended that the benefits of the act were intended to be confined to them. So that the act will not bear that construction.

It must be conceded that the meaning of the word "speculation" is not obvious. If its ordinary meaning were given it, the purpose of the act would be defeated, and therefore that cannot be the meaning intended. Looking to the context, the latter half of the same clause and the clause following, fairly clear up the obscurity.

This clause negatives the purposes of speculation in making the application. The applicant asserts that he does not apply to purchase on speculation. That is, he does not intend to speculate on the privileges

acquired by the application; but to complete the entry and acquire the land for the benefit to result to him by reason of owning it. This is the interpretation given the same language, in an analogous statute, by the supreme court.

Myers v. Croft, 13 Wall., 294.

The negative is, "that he does not apply to purchase the same on specuation," the affirmative, "but in good faith to appropriate it to his own exclusive use and benefit." The affirmative is the antithesis of the negative, and aids to bring out its meaning. In this light the term "on speculation" appears to signify an application on behalf of or for the benefit of another, as contradistinguished from one for the use and benefit of the applicant.

If the construction for which we contend be accepted the clause under discussion prevents an application by a dummy or automaton, for or in behalf of some other person; while the next succeeding clause prevents one who applies on his own behalf, from making any kind of agreement or contract by which the title he may acquire shall inure to the benefit of another before the entry is perfected. The former forbids the applicant to lend his name to the real entryman; while the latter forbids the applicant, who applies in his own behalf, from transferring his claim before

the entry is complete. This construction effects the purpose of the act, which was to make it certain that the land should belong exclusively to the applicant when the entry was completed; and it does not prevent such an entryman from making a sale immediately after the entry and thereby acquiring the only benefit possible to him.

The Secretary of the Interior, in "Annie M. Donahue and Fourteen Others," Mss. Op., delivered December 10, 1903, has the following to say with respect to the meaning of this clause:

"What does the statute intend by the words 'on speculation?' Bouvier's Law Dictionary, 1876 and 1897, defines speculation as 'the hope and desire of making a profit by the purchase and resale of a thing.' Anderson's Law Dictionary, 1893, gives: Speculation. Gambling is not to be confounded with speculation. Merchants speculate upon the future price of that in which they deal, buy and sell accordingly. In other words, they think of and weigh, that is speculate upon the probabilities of the coming market and act upon this outlook into the future.

"Neither of these is properly a definition. The first merely indicates the motive that induces to purchase of a thing as a speculation, the other is a mere thesis upon the distinction between a speculative contract of purchase and a gambling or wagering contract.

"Worcester's Dictionary of 1880 defines speculation as:

" 'The act of paying out money, or incurring extensive risks with view to more than usual success in trade.' A. Smith.

"The Century Dictionary defines it:

" '4. The investing of money at a risk of loss on the chance of unusual gain; specifically, buying and selling, not in the ordinary course of commerce for the continuous marketing commodities, but to hold in expectation of selling at a profit upon a change in values or market rates.'

" 'Speculate. To invest money for profit upon an uncertainty; take the risk of loss in view of possible gain; make a purchase or purchases, as of something liable to sudden fluctuations in price or to rapid deterioration on the chance of selling at a larger advance.

" 'Investment. Expenditure for profit or future benefit, a placing or conversion of capital in a way intended to secure income or profit from its employment; as an investment in active business, or in stocks, land, or the like.'

"Webster's International Dictionary of 1896 and 1903, somewhat changing the definition of the Unabridged Dictionary of 1887, defines speculation

" '(Com.) The act or practice of buying land, goods, shares, etc., in expectation of selling at a higher price, or of selling with the expectation of repurchasing

at a lower price, a trading on anticipated fluctuations in price, as distinguished from trading in which profit expected is the difference between the retail and wholesale price, or the difference of price in different markets.

" 'Any business venture involving unusual risks, with a chance for large profit.'

"In all the definitions there is more or less prominent, persistent and common, the elements of sudden fluctuations in value, liability of loss by depreciation, and contemplated brevity of time before reconversion and liquidation of the subject-matter.

"Still the definitions do not clearly indicate what congress intended to inhibit under the term speculation. Following the familiar rule of statutory construction, to seek in the act itself the meaning of particular words by study of the context, it seems, that the words immediately following 'speculation' explain and define its meaning. If that be accepted, then its meaning is that all the benefit of the title sought to be acquired is in good faith intended to be for the entryman himself, and that there is no intent or contract that it shall inure to any other person, analogous to the requirements in other public land legislation under the settlement laws.

"There is nothing in the act—other than the word speculation itself—in any way indicating that Congress intended that no one should make such entries except

lumber or timber dealers, or those intending themselves to cut and market the timber. If it was intended to so limit these entries it is obvious that more apt words might have been chosen. If it is not to be so limited, it is an absurdity to prohibit or forfeit an entry because the entryman contemplated profiting by sale of the land. He would not make the entry and pay money except from a motive in some way to profit himself, and if he does not intend himself to cut or market the timber and is by statute required to so intend, he perforce must intend to profit in the only way possible —namely, by a sale. This is the construction given to the act by the supreme court and by the department heretofore. In United States v. Budd, 144 U. S., 154, 163, the court says:

"'* * * All that it (the statute) denounces is a prior agreement, the acting for another in the purchase. If when the title passes from the government no one save the purchaser has any claim upon it, or any contract or agreement for it, the act is satisfied. Montgomery might rightfully go ahead and send into that vicinity and make known generally, or to individuals, a willingness to buy timber land at a price in excess of that which it cost to obtain it from the government; and any person knowing of that offer might rightfully go to the land office and make application and purchase the tract from the government.'"

But the supreme court left nothing uncertain or

in doubt as to the purpose or meaning of the act, after its decision in U. S. v. Budd, 144 U. S., 154, 163, as is shown by the language quoted above.

That case also restates very clearly the rule which exacts clear, unequivocal and convincing proof in this class of cases.

"Only that class of evidence which commands respect, and that amount of it which produces conviction, shall make such an attempt successful."

Id., 161, 162.

See, also,

U. S. v. Clark, 125 Fed. Rep., 774.

Counsel have placed great reliance upon the case of United States v. Bailey, 17 L. D., 468. But that case is modified by a later decision in the Donahue case, and in some of its most important rulings is in direct conflict with the decision of the supreme court in the Budd case.

Reliance is also placed on Hawley v. Diller, 178 U. S., 476. But that case decides nothing against us. Entries were attacked before the department, before patents issued for fraud. The department found that they were fraudulent in fact. The supreme court held that this finding was conclusive upon the courts.

Id., 495.

II.

THE DETROIT TIMBER AND LUMBER COMPANY WAS AN INNOCENT PURCHASER FOR VALUE OF THE LANDS IN CONTROVERSY.

This question was so fully and so ably discussed by the circuit court of appeals in its discussion in this case that there is very little that can be added by us. But we feel that it might be of some assistance to court to present the facts as we understand them from the record, and present the authorities in support of our contention, and of the judgment of the circuit court of appeals.

It is not charged by the appellant that the Detroit Timber and Lumber Company in any manner participated in any of the fraud alleged in the bill against the entrymen or against Martin-Alexander Lumber Company, but it is alleged "that on the 14th day of January, 1901, the said Martin-Alexander Lumber Company sold, assigned and transferred to defendant, Detroit Timber and Lumber Company, all said timber, contracts and leases for the timber on said lands, and that before and at the time of such sale, assignment and transfer, the said Detroit Timber and Lumber Company had full and complete knowledge of all the fraudulent acts of the said Martin, Alexander and Copeland in procuring said entries to be made as hereinbefore alleged; of the fraudulent agreements between

said Martin, Alexander and Copeland and the said entrymen as hereinbefore alleged, and had full and complete knowledge that the affidavits of each and every of said entrymen in making said entries was false, and that said entries had been made for the use and benefit of the said Martin-Alexander Lumber Company" (Rec., p. 10).

In answer to this allegation of the appellant the Detroit Timber and Lumber Company says:

"This defendant admits that on the 14th day of January, 1901, the Martin-Alexander Lumber Company sold, assigned and transferred its entire property, and all debts due it, to the Detroit Timber and Lumber Company, and that by said sale, this defendant became the owner of all the subsisting timber contracts and leases for timber on said lands, theretofore made with, and held by, the said Martin-Alexander Lumber Company, and by reason thereof acquired the title to such timber as was then standing on said lands covered by said contracts" (Rec., p. 23).

It denies all knowledge of any fraudulent acts on the part of Alexander and Copeland, and alleges "that on said 14th day of January, 1901, it purchased from the Martin-Alexander Lumber Company, all of its real and personal property, and debts due it, including the timber on the lands in question, in good faith, for the consideration of sixty thousand dollars ($60,000.00); that said purchase of said property and the payment

of the purchase price therefor, were made in good faith and without any fraud or intent on the part of this defendant to defraud the said plaintiff, and without any knowledge, information or belief that the said lands or any part of them, had been irregularly, illegally or fraudulently entered and purchased, as alleged in the said complaint." It also alleges "that all of the patents to said entrymen had been issued long before it had any notice of any claim of the plaintiff that there was such irregularity, illegality and fraud. Therefore this defendant insists that it is an innocent, bona fide purchaser of said timber, for a valuable consideration, without notice of any illegality or fraud, if any ever existed, and that it would be contrary to law and equity to sustain this action." (Owing to error in printed record the last two lines on page 24 and the whole of page 25 has been misplaced. The last two lines on page 24 should follow the word "but" near the bottom of page 23.)

We do not think there will be any material dispute as to the facts connected with this transaction; the only question will be as to the legal effect of the acts of the Detroit Timber and Lumber Company. In order that we may fully understand the position of this company, we will briefly go over the facts in the case as applying to the Detroit Timber and Lumber Company.

In December, 1900, the Detroit Timber and Lumber Company had an office in the city of St. Louis. U. L. Clark its president, was in charge of its affairs. Sometime between the 15th and 22d of that month Alexander, of the Martin-Alexander Lumber Company, called at the office of the Detroit Timber and Lumber Company and stated to Clark that the Martin-Alexander Lumber Company had mill property, a lot of lands and timber in Pike county, that it desired to sell. So far as the record shows, this is the first time the Detroit Timber and Lumber Company knew anything about the property in controversy. After talking the matter over it was agreed that Clark would send their timber inspector, McDonald, down to Pike City to investigate the nature and character of the property owned by the Martin-Alexander Lumber Company.

In pursuance of that arrangement, McDonald left about the 24th of that month, arriving at Pike City on December 25, and began to make an investigation of the property. Clark, about January 9, after having bad reports from McDonald regarding the property, went to Pike City himself to make personal investigation. It must be remembered at this point that the Martin-Alexander Lumber Company had large holdings outside of the lands in controversy, which were included in the purchase made by the Detroit Timber and Lumber Company. After Clark arrived at Pike City he went over the reports made by McDonald,

and figured up the property owned by the Martin-Alexander Lumber Company, and finally made them an offer of sixty thousand dollars ($60,000.00) for their holdings. Martin's interest in the company upon that basis figured out thirty-five thousand dollars ($35,000.00), while that of Alexander amounted to twenty-five thousand dollars ($25,000.00).

Alexander had stated to Clark that he would sell his interest in the company upon the same terms that Martin sold his, Clark, on behalf of his company, refusing to purchase either interest unless he could get it all. After the terms of the trade had been agreed upon, Clark, on behalf of his company, gave to Martin a check for $27,456.79, and also endorsed to him a note of the Bodcaw Lumber Company for $25,000.00. This amount paid Martin included an indebtedness of Martin-Alexander Lumber Company to him for $17,456.79 that company owed him on account, making the total paid Martin $52,456.79.

After the transaction had been arranged to the satisfaction of Martin, Alexander stated that he would prefer stock in the Detroit Timber and Lumber Company to the cash for the amount due him. It was finally agreed between Clark and Alexander that he should be paid in that way, provided Clark's associates in the Detroit Timber and Lumber Company would agree to it, but that if they agreed to it, he would have to wait until the necessary legal steps could be taken under

the laws of the State of Michigan to increase the capital stock of the Detroit Timber and Lumber Company, so as to absorb by the issue of additional stock its surplus, which was, the cost of the Martin-Alexander Lumber Company plant and property, and perhaps additional stock.

In order to wind up the affairs of the Martin-Alexander Lumber Company and to make a final transfer of the property, Martin resigned as president of the company and Clark was elected in his place. The testimony of Clark is clear upon the proposition that in making the purchase he was acting for the Detroit Timber and Lumber Company, and that he only took the position with the Martin-Alexander Lumber Company for the purposes above stated. The deal was practically consummated on the 14th day of January, 1901; all the timber deeds and other deeds held by the Martin-Alexander Lumber Company were turned over to Clark on that day for the Detroit Timber and Lumber Company. Afterwards, on the 22d day of April, 1901, stock of the Detroit Timber and Lumber Company to the amount of $25,000.00 was issued to Alexander in payment of his interest in the Martin-Alexander Lumber Company. This included the stock his wife held in that company, which was controlled by him. The purchase of the interest of Martin also included that of J. O. Means, so that by this purchase and the payment of the $60,000.00 as above stated, the

Detroit Timber and Lumber Company became the owner of all the assets of the Martin-Alexander Lumber Company. As stated above, this method was adopted by Clark, not for the purpose of having the Detroit Timber and Lumber Company or himself become a stockholder in the Martin-Alexander Lumber Company, but for the purpose of securing to the Detroit Timber and Lumber Company, all of the assets of the Martin-Alexander Lumber Company. In other words, it was a purchase by the Detroit Timber and Lumber Company of all the assets of the Martin-Alexander Lumber Company.

It is alleged in the bill, as above stated, that the Detroit Timber and Lumber Company did, on the 14th day of January, 1901, become the purchaser of the assets of the Martin-Alexander Lumber Company, and not denied in the answer. It therefore stands admitted by the pleadings here that on that day the Detroit Timber and Lumber Company became the purchaser of the assets and property of the Martin-Alexander Lumber Company, including all timber contracts held by it on the lands in controversy. At this time thirteen of the entrymen had procured patents to their lands. (See section 10 of bill on pages 9 and 10.)

On the 14th day of March, 1901, a formal conveyance was made by the Martin-Alexander Lumber Company to the Detroit Timber and Lumber Company of all

timber contracts held by it for timber on lands in Pike County, Arkansas, and for all lands in Pike County, Arkansas, "including lands from which timber had been cut off as well as its uncut lands, deeds for which were turned over January 4, last." It will be remembered that the testimony shows that deeds for all of these lands had been turned over on that date.

Afterwards, the Detroit Timber and Lumber Company concluded to, and did, purchase the fee simple title to certain of these lands from the entrymen, a list of which will be found in the stipulation on page 34 of the record. In addition thereto, it purchased the lands of S. Z. Moran and wife and William Dorsey. These parties had conveyed their lands to D. D. Brunson, who afterwards conveyed them to the Detroit Timber and Lumber Company. The company also purchased from Emma Lintz and Henry M. Lintz all the timber standing on the lands owned by them, and took regular deeds of conveyance therefor. The dates of these conveyances and the dates that the patents were issued to the parties will be found on page 78 of the printed record, except that by misprint of the clerk the name of Robert J. Hughes is omitted from this last list. In each case a valuable consideration was paid for the lands and deeds conveying the fee simple title taken, except in the case of the Lintzes, where the deed was given for the timber upon the land. The timber contracts held by the Martin-Alexander Lumber Company

were conveyances of all the timber standing upon the land of the respective entrymen, so that by the purchase from that company by the Detroit Timber and Lumber Company, on January 14, 1901, it acquired all the timber upon these lands, and by the purchase from the entrymen as above stated, it acquired the fee simple title to the land.

There was no testimony of any kind to show that the Detroit Timber and Lumber Company had any knowledge of any irregularity in the entries until in October, 1901, after the last purchase had been made by it, and until long after it completed its purchase from the Martin-Alexander Lumber Company. The first intimation that there was anything wrong in regard to these lands was after the visit of Agent Schlierholz, which, as shown by the record, was about October 4, 1901. Clark's testimony is to the effect that that is the first intimation he had on the subject and there is nothing to controvert it. At this time all of the purchases had been made, the consideration paid and the deeds executed and delivered, and the Detroit Timber and Lumber Company was in full possession of the property.

1. The first point relied upon by the appellant before the circuit court of appeals was substantially that Clark made no investigation of the title to the lands purchased; that if he had investigated he would have found that they were entered under the Timber

and Stone Act, and that if he had compared the dates of the final certificates with the dates of the timber contracts held by Martin-Alexander Lumber Company he must have been convinced that they were made for the benefit of the Martin Alexander Lumber Company, or that they were made on speculation. In stating this proposition, counsel abandon the allegations of their bill to the effect that the Detroit Timber and Lumber Company purchased the lands from the Martin-Alexander Lumber Company on the 14th day of January, 1901, and attempt to limit the transaction on that date to the purchase of the stock of E. B. Martin and Means by U. L. Clark. We insist that they cannot go outside of the issues made by the pleadings. Nothing else is before the court.

But to the question: Where it is sought to charge a purchaser for value with *mala fides*, as in this case, the burden is upon the complainant to show, either actual knowledge of the fraud, or knowledge of some fact, that would make it his duty to inquire, and his failure to do so an act of gross or culpable negligence.

In Townsend v. Little, U. S., 504 (Book 27 L. Ed., p. 1014), the Supreme Court of the United States says:

"As said by Strong J. in Meehon v. Williams, 48 Pa., 238, what makes inquiry a duty is such a visible state of things as is inconsistent with a perfect right in him who proposes to sell."

In Wilson v. Wall, 73 U. S., 83 (Book 18 L. Ed., p. 730), the court says:

"A chancellor will not be astute to charge a constructive trust upon one who has acted honestly and paid full and fair consideration without notice or knowledge. On this point we need only to refer to Sugden v. Vendors, p. 782, where he says: 'In Ware v. Lord Egmont, 4 De Gex. M. & G., 460, the Lord Chancellor Cranworth expressed his entire concurrence in what, on many occasions of late years, had fallen from judges of great eminence on the subject of constructive notice, namely, that it was highly inexpedient for courts of equity to extend the doctrine. When a person has not actual notice he ought not to be treated as if he had notice unless the circumstances are such as enable the court to say, not only that he might have acquired, but also that he ought to have acquired it but for his gross negligence in the conduct of the business in question. The question, then, when it is sought to affect a purchaser with constructive notice, is not whether he had the means of obtaining and might by prudent caution have obtained the knowledge in question, but whether not obtaining was an act of gross or culpable negligence."

The facts in the case last cited were that a patent had been issued to a Choctaw Indian for lands in Alabama under the 14th article of the treaty of September 17, 1830, which provided that the head of

each Choctaw family desiring to become a citizen of the State should be entitled to one section of land and to one-half section for each unmarried child over ten years of age and a quarter section for each child under ten years of age. The patent to William Wall was for three and a half sections of land and designated it as land that had been located by him as his reserve, and the conveyance was to him and his heirs. Wall sold all the land to Wilson and afterwards died. His children then brought suit for the land and alleged that by the death of the father, so much of the land as was his individually descended to them as his heirs, and that the remainder of the land was theirs under the treaty. Wilson set up a defense, that he was a bona fide purchaser, but admitted that he knew Wall was a Choctaw, head of a family, entitled to a reservation under the treaty, but did not know under which article of the treaty he claimed. It is clear, it seems to us, that as to so much of the land as belonged to the children that Wall would hold as a trustee for them, and the able counsel who represented the government in this case would have contended, in that, had they represented the complainants, that as Wilson knew Wall took the land as a head of a Choctaw family under the treaty, that he, Wilson, would have been held to inquire under what section of the treaty he received the patent and also what children he had, and finding children, must

have known the law; that is, that Wall held as a trustee. But the court says:

"The parties to this contract may justly be presumed to have had in view the previous customs and usages with regard to grants to persons 'desirous to become citizens.' * * * But it does not follow that they were acquainted with the doctrine of trusts."

In the case of Williams v. Jackson, 107 U. S., 478, by a trust deed duly recorded land was conveyed to the trustees in fee and they were authorized to release deed to the grantor upon the payment of a negotiable promissory note thereby secured. Before that note was paid or payable, and after it had been negotiated to an endorsee in good faith for full value, a deed of release, reciting that it had been paid, was made to the grantor by the trustees and by the payee of the note and recorded; and the grantor executed and delivered a like trust deed to secure the payment of a new note for money lent him by Williams, who had not actual notice that the first note had been negotiated and was unpaid, and who was furnished with a conveyancer's abstract of title showing that the three deeds were recorded and the land free from incumbrance, before he would make the loan. Jackson, the holder of the note secured by the first deed of trust, brought suit to have the deed of release as well as the deed of trust made to secure Williams' note declared void as against the first deed of trust. The courts say:

"It was suggested in the argument that as the first deed of trust showed that the notes secured thereby were negotiable and were not yet payable and that the land was not intended to be released from this trust until all the notes were paid, Williams was negligent in not making further inquiry into the fact whether they were still unpaid. But of whom should he have made inquiry? The trustees under the first deed and the original holder of the notes secured thereby having expressly asserted under their own hands and seals that the notes had been paid, and Sweet and wife having apparently concurred in the assertion by accepting the deed of release and putting it on record, he certainly was not bound to inquire of any of them as to the truth of that fact; and there was no other person to whom he could apply for information, for he did not know that the notes had ever been negotiated, and he had no reason to suppose that they had not been canceled and destroyed.

"To charge Williams with constructive notice of the fact that the notes had not been paid, in the absence of any proof of knowledge, fraud, or gross or willful negligence, on his part, would be inconsistent with the purpose of the registry laws, with the settled principles of equity, and with the convenient transaction of business."

In Devlin on Deeds, Sec. 729, 1st Ed., the rule is laid down as follows:

"The notice must be so clear that the purchaser cannot take and hold the property without fraud."

Citing

Hall v. Livingston, 3 Del. Ch., 348.

See, also,,

Shepherd v. Shepherd, 36 Mich., 173.

"What will amount to this 'reasonable diligence,' and when the purchaser will be affected by constructive notice, will depend on the circumstances of each case. 'It is scarcely possible,' says Vice Chancellor Wigram, ' to declare *a priori,* what shall be deemed constructive notice, because unquestionably that which will not affect one man may be abundantly sufficient to affect another. But I believe I may, with sufficient accuracy for my present purpose, and without danger, assert that cases in which constructive notice has been established resolve themselves into two classes; first, * * * and secondly, where the court has been satisfied, from the evidence before it, that the party charged had designedly abstained from inquiry for the very purpose of avoiding notice. * * * The proposition of law upon which the second class proceeds is, not that the party had incautiously neglected to make inquiries, but that he had designedly abstained from such inquiries for the purpose of avoiding knowledge —a purpose which, if proved, would clearly show that he had suspicion of the truth, and a fraudulent determination not to learn it. If, in short, there is not

actual notice that the property is in some way affected, and no fraudulent turning away from a knowledge of facts which the *res gestae* would suggest to a prudent mind—if mere want of caution, as distinguished from fraudulent and willful blindness, is all that can be imputed to the purchaser, there the doctrine of constructive notice will not apply; there the purchaser will be considered, as in fact he is, a bona fide purchaser without notice.' 1 Hare, 55, cited; 2 White & T. Lead. Cas. Eq. (Hare & W. notes.")

Hardy v. Harbin, 1 Sawyer, 194 (Fed. Cases, 6059).

The case of Hardy v. Harbin was one where the defendant claimed under a patent from the United States, and the court further states:

"The doctrine of constructive notice should not, in my judgment, be extended contrary to the tendency and spirit of the recent decisions to a new class of cases. It is essential to the security and repose of a vast number of fairly acquired titles in this State that the right of the purchaser, who without actual notice, has obtained the legal title from the United States under a patent, should be firmly upheld.'

The cases above cited we think fully sustain the rule as stated by us.

Of what facts did Clark have notice that should have put him upon inquiry? For the purchaser must have actual notice of some fact that makes inquiry necessary.

Mills v. Smith, 8 Wallace, 27.

The burden is upon the government in this case.

"The burden is upon the attacking creditor, but when fraudulent intent on the grantor's part is made out and the circumstances are suspicious, the purchaser must show that he has paid value, and if he does, it must then appear that the purchaser had notice of the fraud."

In the case of Colorado Coal and Iron Company, *et al.* v United States, 123 U. S., 307, the syllabus is as follows:

"The title of such a purchaser (bona fide purchaser for value) rests upon the strongest presumptions of fact, which, although they may be rebutted, nevertheless can be overthrown only by full proofs to the contrary, clear, convincing and unambiguous. The burden of producing these proofs and establishing the conclusion rests upon the government, in an action by it to cancel a patent which it has issued, and it is not relieved of this burden by the negative nature of the proposition it is bound to establish."

Crawford v. Neal, 144 U. S., 585.

Jones v. Simpson, 116 U. S., 609.

It was urged by counsel for appellant before the circuit court of appeals that:

"Mr. Clark must have known that the timber contracts were not good unless the parties who executed them had title to the land." If by "title" they mean a

patent from the United States, we beg leave to differ with them. When the entrymen paid for the land and obtained their final receipts, they had the right to sell.

"The object of Congress was attained when the pre-emptor went, with clean hands, to the land office and proved up his right, and paid the government for his land. Restrictions upon the power of alienation after this would injure the pre-emptor and could serve no important purpose of public policy."

Meyers v. Croft, 13 Wall., 291.

Acting upon this well-known principle, thousands of purchases are made every year from vendors who have no other title than a final certificate.

Clark was informed at the time he made the trade, and it is a fact established fully by the testimony, that at that time all the entrymen had either final receipts or patents to their land. But it was stated in appellant's brief that on the 14th day of January, 1901, thirteen patents had been issued, and that timber contracts had been given on lands for which patents had not been issued; that if Clark had investigated the title to the lands covered by these twenty-eight contracts he would have found that they were entered under the Timber and Stone Act. "That was the only act which authorized the purchase of public lands in Arkansas. He must also have known of the limitations put upon the entry of these lands, to-wit: that they must be entered for the use and benefit of the entrymen and not

on speculation, and that they were not entered for the benefit of any other person. He would also have known that a violation of these requirements would have forfeited to the government the purchase price paid for those lands as well as vacating the entries. The dates of the contracts in his hands following so nearly the dates of the final receipts must have convinced him that these entries were made in violation of those provisions. If he were not convinced that they were made for the benefit of the Martin-Alexander Lumber Company, he must have been convinced that they were made on speculation by the entrymen. In either event he must have known that the entries were fraudulent."

This statement contained the gist of the appellant's contention. Let us therefore examine it carefully and see whether, measured by the well-known principles of equity, it shows a want of good faith on the part of the Detroit Timber and Lumber Company.

In the first place, Clark did not know that the lands had been entered under the Timber and Stone Act. In his cross-examination by the solicitor for the government he was asked:

"Q. Did you know at that time how title to government lands could be acquired in the State of Arkansas?

"A. All I knew about it was under the homestead act; I had known about them for some time.

"Q. Did you understand then that the statements made there in regard to final receipts were made in reference to entries under the homestead act?

"A. I didn't know whether it was or not; I supposed so; I didn't know it" (Rec., p. 396).

"But," says the appellant, "he should have investigated the title." If this is so, he was bound only to investigate the public records. He would then have found that each entryman had complied with the law to its very letter; that patents had been issued to thirteen entrymen and final receipts to the others. The legal presumption would have been that all the necessary steps had been complied with.

Lea v. Polk County Copper Co., 62 U. S., p. 493 (Book 16 L. Ed., 205).

Where a purchaser finds that a patent has been issued he is not required to look behind it.

Bagnell v. Broderick, 13 Pet., 448.

"If a patent from the government be presented, surely a purchaser from the patentee is not derelict, and does not fail in such negligence and care as are required to make him a bona fide purchaser, because he relies upon the determination made by the land officers of the government in executing the patent, and does not institute a personal inquiry into all the interior transactions upon which the patent rested."

United States v. California & Oregon Land Co., 148 U. S., 31 (Book 37, L. Ed., p. 361).

In United States v. Minor, 29 Fed., p. 134, the court says:

"The patent could only be assailed by matters resting in parol *dehors* the record. Innocent parties were entitled to rely upon the record."

But it was contended that if Clark had examined the dates of the final receipts and of the timber contracts he must have been convinced that the entries were made in violation of the law.

The nearness of the dates is the only fact appellant claimed or asserted would have been brought to Clark's attention by an examination of the papers before him. At most, this could have only been an inference. It is not a fact that would have attracted the attention of the ordinary business man, and in all probability might have escaped the attention of the most careful lawyer unless he had theretofore scented fraud and been on the search for it. It did not necessarily follow that because shortly after the final receipts had been issued, that the entrymen had sold the timber on their land. They had the right to sell, provided they had in good faith made the entries for their own use, not for the benefit of another or on speculation. If anything at all, the fact of the nearness of dates would have been a circumstance amounting to a mere suspicion of fraud. Such circumstances are not to be deemed notice.

"Where an inference of notice is to affect an innocent purchaser it must apear that the inquiry suggested, if fairly pursued, would lead to a discovery of the defect."

Simmons v. Morse, 2 Fed., 325.

But suppose this fact had met the attention of Clark, and that his suspicions had been aroused. He might then have called for the original applications and other papers in the case. He would have found that each entryman had sworn that he did not apply to purchase the land on speculation but in good faith to appropriate it to his own exclusive use and benefit; and that he has not, directly or indirectly, made any agreement or contract, in any way or manner, with any person or persons whatever, by which the title which he might acquire from the government of the United States would inure in whole or in part to the benefit of any person except himself.

U. S. Compiled Stat., Vol. 2, Sec. 3, p. 1546.

This was the affidavit made by each and every entrymen, as shown by the record. Would not this have been sufficient to have overcome his suspicions? But assume that it was not, he might then have applied to the officers of the land office to know whether there was any fraud in these entries. The register and receiver had seen all these parties, knew all that had occurred at the land office—how the entrymen came and who their witnesses were. What answer would they have re-

ceived? They would have stated to him that so far as they knew the entries were properly made and that they were not tainted with fraud—that thirteen patents had been issued and that the others would be issued, as they were afterwards.

In Lea v. Polk County Copper Company, *supra*, the charge of fraud was that the land had been entered by William Pinkney Lea; as orginally filled up, the patent was in the name of William P. Lea; the register altered it by adding the letters "a-r-k" to the P. This alteration was plain to be seen; William Park Lea afterwards sold the land to parties who claimed as bona fide purchasers. It was claimed by complainant, who sought to set aside the sale, that the apparent alteration was sufficient to put the purchasers upon inquiry. The court says:

"Now, if they had inquired of the register, he could only have told them that he put the letters there in the course of his official duty; but when, he could not say, this being what he proves here. Then the presumption comes in that, as a public officer, the register did his duty, and he who impeaches the act as illegal must prove the allegation."

Should the inquiry end here? We think so most certainly. Clark was not required to pursue it further. He was not required to seek out hidden fraud or to seek for the motives of the entrymen in selling their timber to Martin-Alexander Lumber Company, or of

the Martin-Alexander Lumber Company in selling to the Detroit Timber and Lumber Company.

It can hardly be supposed that a vendee is bound to inquire of the parties to a conveyance whether they are committing a fraud by suppressing anterior deed, etc., for it is evident that if fraud was intended, deception would be carried out by denial. Such inquries are not resorted to in practice in business transactions.

Hare & Wallace Notes to Leading Cases in Equity, Vol. 2, pp. 66, 67.

Miller v. Froley, 23 Ark., 745.

Ferguson v. May, 4 Ky. Law Rep., 989.

"A concealed defect or secret equity arising from the conduct of those who originally owned the property of which the purchaser had no notice cannot be set up against him."

Danberry v. Robinson, 14 N. J. Eq., 213.

To secure in equity all the rights of a bona fide and duly vigilant purchaser one is not required to make inquiry whether there is fraud or trust where the title and possession give no indication that there is either.

Leach v. Ausbacher, 55 Pa. St., 85.

Yardly v. Torr, 67 Fed., 857.

Fletcher v. Peck, 6 Cranch, p. 135.

Anderson v. Roberts, 18 Johns. R., p. 531.

But supposing Clark had deemed it his duty to have gone to each of the entrymen and to have put

Martin, Alexander and Copeland on the rack, we know each one would have stated to him what their sworn testimony in this case has been—that there was no prior agreement, and that the entries were made in good faith for the sole benefit of the entrymen and not for the purpose of speculation.

"The omission of the party to make inquiry cannot be material when such inquiry would not have led to a knowledge of the fact with the notice of which it is sought to charge him. The question is whether the inquiry, if it had been made, would have afforded information on any fact material to his rights. If his conduct would have been the same whether he had or had not made inquiry, his omission cannot be a reason for charging him with notice."

Am. & Eng. Enc. of Law, Vol. 21, p. 588, and authorities cited.

We think we have clearly shown that by the most diligent inquiry Clark could not have discovered any fraud in making the entries. It cannot, of course, have been expected of him that he could have made as thorough an investigation as the government has since made. The law does not require that he should. If such were the requirement there would either be no transactions in real estate or some inquisitorial tribunal would have to be organized to inquire into the conduct and motives of all persons desiring to sell.

But supposing Clark had known all the facts then

that are disclosed by the record, would he have been charged with bad faith in making the purchase? So learned a lawyer as the circuit judge before whom this case was tried below, with full knowledge of all the facts, has by his decree solemnly declared that there was no fraud in making these entries. Even if the question had been a doubtful one and Clark had in the exercise of his honest judgment, concluded to purchase and the court had afterwards determined that the entries were fraudulent, he would still have been a bona fide purchaser. All that is required is that the purchaser act in good faith—that there is an absence of bad faith—that he is in no way connected with the fraud.

"A party may have notice of conflicting claims, and still, in the exercise of an honest judgment as to the rightful owner, buy property and pay for it, and be acting in good faith."

U. S. v. Southern Pac., 184 U. S., 54.

2. It was also urged by appellant that Clark and McDonald must have learned from the books the condition and nature of the accounts against Dorsey and Moran and wife—that the amounts charged to them were for moneys advanced for the entry of these lands. If they learned the facts with regard to those entries, they were bound to learn the facts with regard to other entries. We cannot accept the reasoning of appellant's solicitors on this point. It might have been true that the

company had advanced money to one, two or three entrymen and yet not have advanced it to others. Nor does it follow that Clark or McDonald would have understood the nature or effect of these entries.

It must be remembered that the trade was made between the Detroit Timber & Lumber Company and the Martin-Alexander Lumber Company on the 14th day of January, 1901. At that time, payment in full was made for all the timber deeds. This payment is represented by the $17,456.79 paid Martin for sums advanced by him to pay out for timber deeds, as shown by the trial balance (Rec., pp. 385 and 396). So, as we will hereafter attempt to show, if Clark or the Detroit Timber and Lumber Company were acting in good faith at the time the purchase money was paid, nothing that occurred thereafter could change or alter their position. They bought and paid at that time for all the timber owned by Martin-Alexander Lumber Company on those lands. What knoweldge, therefore, did Clark have at that time?

Clark's testimony is that he never examined the books of the company—all he had was their trial balance showing their assets and liabilities and the amount invested in lands (Rec., pp. 65 and 68). When asked if he verified the trial balance by looking over the books his answer was "No. Mr. Rowe, their bookkeeper, assured me the trial balance was correct according to

their books. I never had anything to do with their books" (Rec., p. 40).

But what information could Clark or McDonald have obtained from either of the Morans or Dorsey? The testimony of Seborn Z. Moran and Dorsey is in the record. They were evidently hostile to the defendants, yet no witnesses swore more lustily than did they that their entries were made in good faith, without any prior agreement and for their own use. (For testimony of Moran on this point, see Rec., pp. 263 to 265, and for the testimony of Dorsey see Rec., pp. 288 and 289). The testimony of these witnesses will show as strongly as it can show that as to the entries made by them there was no violation of the law or any fraud practiced on the government. What, then, could Clark or McDonald have obtained from that source?

It might with some propriety be said that a person buying from an insolvent person should be required as to creditors of the vendor to examine his books— but we know of no rule or reason that would require a person buying from a person or corporation entirely solvent to do so. It could not be reasonably supposed that if Martin-Alexander Lumber Company had intended, or had in fact, entered into an agreement or combination with the entrymen to defraud the United States government out of these lands that they would have perpetuated the evidence of their fraud upon the books of their company. And it is not reasonable to suppose

that a purchaser from them should be expected to find such evidence there. As a matter of fact, the accounts referred to are, as we understand it, mere "stumpage" accounts entered up under the name of the individual, showing in the debtor column what the timber had cost, and in the credit column the amount of timber cut at fifty cents per thousand feet. All the accounts of Martin-Alexander Lumber Company were kept in this manner regardless of whether the timber had been bought on the lands in controversy or on other lands (Rec., p. 70). How the timber had been paid for was not known to Clark and did not concern him so long as it had been paid. He did not know at the time the "Timber and Stone" lands, as they were called, from any other (Rec., p. 70).

The fact that Clark, acting for the Detroit Timber and Lumber Company, made no investigation of the title to the lands purchased from Martin-Alexander Lumber Company, cannot, we think, cast even a suspicion upon the bona fides of this tranasction.

The argument upon this point was made by counsel for appellant upon the seeming assumption that the lands in controversy were all that were purchased by the Detroit Timber and Lumber Company at that time; as a matter of fact, these lands did not constitute more than about one-third of the assets of the Martin-Alexander Lumber Company. They had in addition timber contracts on seven thousand acres of land, at the same

rate of stumpage, procured from the receiver of the Smithton Lumber Company (Rec., p. 412). The Detroit Timber and Lumber Company paid for the assets of the Martin-Alexander Lumber Company sixty thousand dollars. The amount paid for the timber on the lands in controversy amounted to only $17,456.79 (Rec., p. 395).

Certainly to secure that amount of timber by a fraudulent device would not justify a company in expending nearly four times that sum.

Clark had been assured by Martin and Alexander both that the titles were good, and he was willing to take their word for it. When questioned why he was willing to rely upon their statements his reply was, that he considered them good, reputable citizens and reliable men, and the timber they had was only enough to keep the mill going three years, and that he didn't think it was necessary to get abstracts, etc. He also states that every title obtained from them, with the exception of the land in controversy, was just as it had been represented (Rec., p. 392). A man should certainly not be condemned for having confidence in his fellowmen, especially when it is proved that that confidence has not been abused.

3. It was contended by appellant that the Detroit Timber and Lumber Company was not a bona fide purchaser even on March 1, 1901, for the reason that it had not acquired the legal title.

It was asserted in appellant's brief in the circuit court of appeals, that:

"It (the Detroit Timber and Lumber Company) acquired the title to no part of this property until March 27, 1901. Deeds were then taken through the months of April and May. One deed was taken September 17, 1901. The instrument of conveyance by the Martin-Alexander Company to the Detroit Timber and Lumber Company, while it purports to have been executed on the first of March, 1901, was not attested until the 11th of March and was not acknowledged until the 2d day of May following. This leaves the date of its delivery in doubt. At any rate it was not sooner than March 1, 1901."

It was also urged that as the amount paid the entrymen at the expiration of their deeds was not a substantial part of the consideration, and not sufficient to make the Detroit Timber and Lumber Company a bona fide purchaser, that "the large amounts had been paid long prior to the execution of the deed and constituting an antecedent debt or claim cannot be regarded as valuable considerations." In view of the allegations of the bill and the conceded facts in this case, we must say that there is nothing in the record upon which to base this argument. A statement of the facts, will, we think, be a complete answer.

First—The allegations of the bill, conceded by the answer are "that on the 14th day of January, 1901, the

said Martin-Alexander Lumber Company sold, assigned and transferred to defendant, Detroit Timber and Lumber Company, all said timber contracts and leases for the timber on said lands," and that at that time the Detroit Timber and Lumber Company knew of the fraud that had been perpetrated by its said vendor and the entrymen (Rec., p. 10).

The allegation that the purchase was made on the 14th day of January, 1901, is borne out by all the testimony. Clark so testifies, as does also Alexander.

The statement of Alexander is to the effect that as soon as Martin accepted Clark's proposition, a stockholders' meeting of the Martin-Alexander Lumber Company was called, at which Martin presided. Means and Alexander, who controlled his own and his wife's stock (Rec., p. 409) were present. Martin tendered his resignation and Clark was elected in his place for the *purpose of winding up the business of Martin-Alexander Lumber Company.* (Testimony of Alexander, Rec., p. 407).

A copy of the resolutions adopted at that meeting will be found on pages 427 and 428 of the record, and for the convenience of the court we will here copy them in full:

Pike City, Ark., January 14, 1901.

1. "Resolved, That the Martin-Alexander Lumber Company does hereby sell all its personal and real property and all debts due it, to the Detroit Timber and

Lumber Company, for the sum of sixty thousand dollars ($60,000.00) cash and the assumption of all the liabilities of this company, and that the said sum be divided among the stockholders of this company as follows:

To E. B. Martin	$ 34,850.00
To Mrs. B. M. Alexander	24,850.00
To A. V. Alexander	150.00
To J. O. Means	150.00

The said sums due the said E. B. Martin and J. O. Means are now paid to them in cash by the Detroit Timber and Lumber Company, and the said Mrs. B. M. Alexander and A. V. Alexander agree to defer the payment of the sums due them until their application for stock in the said Detroit Timber and Lumber Company is acted upon by that company.

2. Resoved, That in order to relieve the said E. B. Martin, who is a resident of Chicago, Ill., from further attendance during the time necessary to effect a transfer of the said property so sold, his stock is transferred to U. L. Clark and . Detroit Timber and Lumber Company, and the said U. L. Clark is for the purpose of said transfer elected temporary president of this company instead of E. B. Martin, who has this day resigned."

The above is a true copy of the resolutions adopted by the Martin-Alexander Lumber Company.

A. V. ALEXANDER,

Secretary.

Nothing can be clearer than that as between the parties the Detroit Timber and Lumber Company purchased all the assets of the Martin-Alexander Lumber Company on that date. What, therefore, so far as the issues of this case are concerned, did the Detroit Timber and Lumber Company acquire by this purchase? The counsel for appellant seem to treat the timber contracts, as they are called, as mere choses in action, and that all that the Detroit Timber and Lumber Company acquired was a lot of open accounts against the various entrymen. This view of the matter is entirely erroneous. The so-called timber contracts were in fact deeds for all the timber standing upon the land. They were absolute conveyances, and as between the entrymen and Martin-Alexander Lumber Company, passed all the title the entrymen then had or might thereafter acquire to the timber.

A form of the timber deeds given in each case will be found on pages 35 and 36 of the record. The language used is apt to convey and does convey a legal title to the timber. The deed recites that the vendor has bargained, sold and conveyed all of the timber and trees now standing upon the land described. It also admits the payment of $407.70 of the purchase price, and stipulates for the payment of the balance. It is signed and regularly acknowledged. At the time these timber deeds were made final receipts had been issued by the land office to the entrymen. On the 14th day

of January, 1901, thirteen of the entrymen had their patents. There can be no question but that at that time the Detroit Timber and Lumber Company obtained at least the equitable title to all the timber standing on the lands in controversy.

The fact that all the purchase money was not paid then does not affect the title acquired. The greater part of it was paid and the Detroit Timber and Lumber Company was irrevocably bound to pay the remainder, viz.: the amount due Alexander. The resolution of the Martin-Alexander Lumber Company was in equity a conveyance of all its title to the Detroit Timber and Lumber Company, under the maxim that "Equity regards that as done which should be done."

The resolution also directed Clark to make the formal transfer. This was afterwards done, on March 1. It is true this conveyance was not acknowledged until in May—but as Clark was president of both companies we think the conveyance would be treated as having been delivered at the time of its execution. It was good as a conveyance without acknowledgment; the only effect the acknoweldgment could have would be to admit it of record. But as we shall hereafter show, there can be no significance attached to the time the deed was delivered.

There was no question made by the pleadings as to when the transfer was made, as we have above stated, and we think the appellant is bound by the issues as made.

The strength of the appellee's position lies in the fact that without notice and for a valuable consideration it purchased this property, both from the Martin-Alexander Lumber Company and the entrymen, and afterwards acquired the legal title to it, both by the conveyance from the Martin-Alexander Lumber Company above referred to and by the warranty deeds from the entrymen after they had procured their patents from the government. It must be conceded, we think, that on the 14th day of January, when the purchase was made and the greater part of the price paid, that the Detroit Timber and Lumber Company had no notice of any fraud in these transactions. Nor can notice of any of the alleged irregularities or fraud be brought home to it until long after the settlement with Alexander, and the taking of the deeds from the entrymen. The first notice it had was when Schlierholtz began his investigation in October, 1901. At that time it had acquired not only the equitable but the legal title to all this property.

Our contention is that the time this suit was brought the Detroit Timber and Lumber Company had not only the equitable but the legal title to all this property.

The statutes of Arkansas provide:

"If any person shall convey any real estate by deed, purporting to convey the same in fee simple absolute, or any less estate, and shall not at the time

of such conveyance have the legal estate in such lands, but shall afterward acquire the same, the legal or equitable estate afterward acquired shall immediately pass to the grantee, and such conveyance shall be as valid as if such legal or equitable estate, had been in the grantor at the time of the conveyance." (Kirby's Digest, Sec. 734.)

It acquired the legal title to the timber on the lands of the entrymen from whom it did not take deeds to the fee simple title by reason of the fact that those entrymen had conveyed the timber to the Martin-Alexander Lumber Company and had afterward obtained their patents; this vested the absolute legal title to the timber in the Martin-Alexander Lumber Company under the statute of Arkansas, and that company then conveyed all its title to the Detroit Timber and Lumber Company (Rec., pp. 34, 35, 425, 426). As to the other entrymen, fee simple deeds were executed and delivered to the Detroit Timber and Lumber Company after the patents had been issued, as will be seen from an examination of the records above referred to.

The authorities relied upon by appellants to sustain its position are Hawley v. Diller, 178 U. S., 476, and Butler vs. Douglass, 1 McCrary, 630. We have not had an opportunity of examining the last case cited, but take it that the doctrine pronounced by it is not different from that of Hawley v. Diller. The case of Hawley v. Diller is not, we think, in any respect applicable

to the case at bar, nor in conflict with the authorities we shall cite to maintain our position. Hawley v. Diller was not a case where the government was attempting to set aside a patent, but was an action instituted by Hawley, who had at best an equitable title against Diller who entered the land, after the entry by Hackley, Hawley's vendor, had been set aside. Diller procured the patent from the government and was therefore the legal owner of the property. In other words, it was a contest between the equitable title of Hawley and the legal title of Diller. The most that it can be said to have decided was, that a purchaser from an entryman, before a patent issued, acquired only an equitable title subject to be defeated by the refusal of the government to issue a patent; that the land department had jurisdiction to cancel an original entry for public lands at any time before a patent issued. In other words, that one who purchases before patent issues is a purchaser *sub judice.* It is not necessary for us if we could to combat this doctrine.

Here the position of the parties is reversed. The government has only an equitable title, while the Detroit Timber and Lumber Company has equally as strong equities as those of the government and has in addition the legal title.

"Where there is equal equity the law must prevail, and this is generally true; for in such a case the defendant has an equal claim to the protection of a

court of equity for his title as the plaintiff has to the assistance of the court to assert his title; and then the court will not interpose on either side; for the rule then is '*In aequali jure melior est conditio possidentis,*' and the equity is equal between persons who have been equally innocent and equally diligent. It is upon this account that a court of equity constantly refuses to interfere either for relief or discovery against a bona fide purchaser of the legal estate for a valuable consideration without notice of the adverse title, if he chooses to avail himself of the defense at the proper time and in the proper mode. *And it extends its protection equally if the purchase is originally of an equitable title without notice and afterwards with notice the party obtains or buys in a prior legal title in order to support his equitable title.* This doctrine applies strictly in all cases where the title of the plaintiff seeking relief is equitable. But it yet remains a matter of some doubt whether it is applicable to the case of a plaintiff seeking relief upon a legal title. The purchaser, however, in all cases must hold a legal title, *or be entitled to call for it,* in order to give him the full protection for his defense."

Story's Eq. Jur., Vol. 1, 64 c., 13th Ed.

The italics are ours.

See, also,

Pomeroy's Eq. Jur., Vol. 2, Secs. 740, 766 and 771.

In the case of United States v. Winona & St. Peter R. R. Co., 165 U. S., 463, in discussing the act of 1896 passed for the purpose of protecting bona fide purchasers of railroad land, the court says:

"Further, there was no need of any legislation to protect a bona fide purchaser. This had been settled by repeated decisions of this court. United States v. Burlington & M. R. Co., 98 U. S., 334, 342. Colorado Coal & Iron Co. v. United States, 123 U. S., 307, 313, reaffirmed in United States v. California & O. Land Co., 148 U. S., 31, 41. For in each of those cases it was decided that, although a patent was fraudulently and wrongfully obtained from the government, if the land conveyed was within the jurdisdiction of the land department, the title of a bona fide purchaser from the patentee could not be disturbed by the government, so that this provision was absolutely unnecessary if that which is now claimed by counsel for the government is all that was intended by Congress."

It was contended by counsel for the government that the sums paid the entrymen, at the time the deeds were taken from them, was not an adequate consideration. The entrymen as shown by the timber deeds to Martin-Alexander Lumber Company had been paid by that company sums ranging from four to five hundred dollars for the timber on the land. These sums the Detroit Timber and Lumber Company repaid the Martin-Alexander Lumber Company and necessarily

formed part of the purchase money paid by the Detroit Timber and Lumber Company. For the fee in the land the Detroit Timber and Lumber Company paid such sums as were agreed upon betwen them and the entrymen. There is no testimony that the Detroit Timber and Lumber Company procured the lands for an inadequate consideration. But had they done so in fact, there are authorities that hold that all that was necessary was that the consideration should be valuable.

"The consideration, however, while it must be valuable, need not be commensurate with the value of the property."

Amer. & Eng. Enc. of Law, Vol. 23, p. 488.

"The court will not inquire whether the consideration was adequate but only whether it is valuable."

Bullock v. Sadlier, Ambler, 763.

"Where a thing for a valuable consideration is agreed to be done, a court of equity considers it as done, and therefore, from the time of an agreement to purchase and the money paid this court considers the estate as the property of the purchaser."

Dean v. Anderson, 34 N. J. Eq., 508.

"The amount of the consideration is not necessarily material when the grantor is solvent."

Wait on Fraud. Convey. and Creditors' Bills, 1st Ed., Sec. 369.

It does not matter in this case that the Detroit Timber and Lumber Company did not acquire the legal

title at the time it paid the purchase price for these lands.

"The settled doctrine is that if a second or other subsequent holder who would otherwise be postponed to the earlier one obtains the legal estate or *acquires the best right to call for a legal estate* he thereby secures an advantage which entitles him to priority."

Pomeroy Equity, Sec. 727.

"It has already been stated that in order to avoid the postponement of the latter equity freedom from notice is indispensable. The notice, however, here referred to is a notice existing at the acquirement of the equity, not a notice at the completion of the right. The latter purchaser or incumbrancer, on payment of his money, becomes an honest claimant in equity, and is entitled, if he can, to protect his claim. But he is not bound to look for protection until he has ascertained that the danger exists; and his right to obtain it will continue, notwithstanding the institution of a suit to settle the priority of the conflicting claimants." Adams Equity, 161-162.

See, also,

Deuber Watch Case Manufacturing Company v. Daugherty, 62 Ohio State Rep., 589.

And this is the rule laid down by the supreme court of the United States.

In Lea v. Polk County Copper Company, 62 U. S., 493, the court says:

"And so the respondents, the Mining Company, might buy in the legal title of William Park Lea, after they had notice, if they were innocent purchasers, holding under John Davis, and Mastin, Keith & Caldwell. 1 Story Eq., Sec. 411."

Even if the Detroit Timber and Lumber Company had never acquired the legal title it might well be contended that as they had a right to call for it, the government could not recover in this case. The Detroit Timber and Lumber Company in good faith paid the purchase money and were in possession of the property. The title of the government is only an equitable one.

"But although as a general rule the defense of purchase for value and without notice can apply only in favor of one holding the legal estate and against the holder of a prior equitable title, yet it has been said that where the equity of the prior party does not amount to a property right—a title or estate—but is a mere right 'to set aside a deed for fraud or to correct it for mistake,' it is not essential that the subsequent party should have the legal estate." Amer. & Eng. Enc. of Law, Vol. 23, p. 486.

"If the subsequent party having purchased his equitable interest for value and without notice has the best right to call for the legal title, he will be protected against the prior equity to the same extent as if he had actually obtained a conveyance of the legal estate;

as against him equity will afford no assistance to the holder of the elder equity." Idem.

In the case of Town of St. Johnsbury v. Calvin Morrill, 55 Vt. Rep., 165, the facts were as follows:

Morrill, who was first selectman of the town of St. Johnsbury, had purchased a piece of real estate with the funds of the town and held it as trustee for the town, the trust not appearing in the deed made to him. The land was used by the town for getting out stone and drawing dirt therefrom. This use was continued for several months. Afterwards Morrill sold the property to the slaughter-house company, in payment whereof the company verbally assigned to said Morrill a written award in their favor of land damages against a railroad company for the sum of three hundred dollars. No deed was executed by Morrill to the slaughter-house company; that company went into possession of the land, fenced and to some extent improved it, and was in possession at the time the suit was brought. Suit was afterwards brought by the town against Morrill to compel him to make a deed of the land to it and for other relief. The slaughter house company intervened and claimed the title under its purchase above stated. The courts say:

"The question presented is unlike most of the cases where the defense of purchaser for value without notice has been invoked, but the case is one where the defense may be made, although the defendant company has got

no actual conveyance. Lord Manners observes: 'I have always thought that he who had the best right to call for the legal estate is entitled to this defense.' 1 Ball and Beat., 171. Lord Cowper lays it down as a rule that a purchaser for value without notice shall not be damaged in equity, not only where he has a prior legal estate but where he has a better right to call for a legal estate than his adversary. Lord Hardwick sanctions the same doctrine in Wiloughby v. Wiloughby, 1 Term R., 763. Lord Cranworth declares that the principles on which the court protects a purchaser for value without notice is not confined to cases where he has got in the legal estate and that circumstance will be quite unimportant in determining whether the court will interfere or not. He says further, speaking of the case in hand: 'His equity depends on this that he stands equitably in at least as favorable a position as his opponent, and therefore the court will not interfere against him.' 5 House of Lords, C., 905.

"Lord Redesdale lays down the rule as follows: 'Supposing a plaintiff to have a full title to the relief he prays and the defendant can set up no defense in bar of that title, yet if the defendant has any equal claim to the protection of a court of equity to defend his possession, as the plaintiff has to the assistance of the court to assert his right, the court will not interfere on either side.' Mitford P., 361. The doctrine is

clearly set forth in notes to Bassett v. Nosworthy, 2 Leading Cases in Equity, 102."

The court further on says:

"The equity of the defendant company is the equity of a purchaser for value in good faith without notice. To this extent the parties are on an evener. But the defendant company is in possession and has expended money in repairs and improvements. They may well say to the court, 'You should not interfere when our right of possession is just as good as the orator's to turn us out and put the orator in, or transfer the legal title to the orator so that it will be enabled to turn us out."

Since the patents issued before the government sought to attack the entries, the bona fide purchaser from the entrymen is in the same position he would have occupied if the patents had issued before his purchase. If the patent issues before it is attacked, whether before or after sale by the patentee is immaterial.

U. S. v. Clark, 125 Fed., 774.

4. It was stated by counsel for appellant in the circuit court of appeals that "U. L. Clark bought the stock of Martin and Means in the Martin-Alexander Lumber Company.' He was then a stockholder in that company. The effect of any notice that the Martin-Alexander Lumber Company had had was not changed from the fact that Clark became a stockholder therein.

An examination of the conveyance from the Martin-Alexander Lumber Company to the Detroit Timber and Lumber Company shows that it was not in fact a sale for value, but the merger of the former into the latter.

Replying to this argument, we say in the first place, the question here is not what notice the Martin-Alexander Lumber Company had, but what notice the Detroit Timber and Lumber Company received, at the time the purchase was made. Notice to the Martin-Alexander Lumber Company could not be notice to the Detroit Timber and Lumber Company. Those two companies were adversary the one to the other. They were trading at arm's length. The trade had been made before Clark was elected president of the Martin-Alexander Lumber Compay—the liability of the Detroit Timber and Lumber Company became fixed; Clark gave his check to Martin that day for $27,456.79 (Rec., p. 384).

In the second place, we reiterate that it was not the purchase of the stock of the Martin-Alexander Lumber Company but of its lands, timber and other assets. Not only is this the statement of the witnesses, but the resolution passed by the Martin-Alexander Lumber Company, and the conveyance from the Martin-Alexander Lumber Company to the Detroit Timber and Lumber Company both so declare. The language of the resolutions is, "Resolved that the Mar-

tin-Alexander Lumber Company does hereby sell all its personal and real property," etc.

The language of the deed is that "the party of the first part for said consideration, does hereby grant, bargain, sell and convey to the said party of the second part," etc. The method adopted was the one Clark thought best to obtain a transfer of the property of the one company to the other.

"It is a maxim in equity that it looks to the intent and not to the form. It always looks at the substance of things, and attempts to reach that, and to enforce the rights and duties which spring from that and the real intent of the parties."

Varner v. Rice, 44 Ark., p. 251.

But in no event could anything that transpires with reference to the transfer of the stock at that time affect the legal title obtained by the Detroit Timber and Lumber Company afterwards from the entrymen after they had procured patents.

In the third place, for the reasons above given, there was no merger of the two companies. And there was no merger for the additional reason that one company was organized under the laws of the State of Michigan and the other under the laws of the State of Arkansas, and there could be no merger or consolidation without legislative authority, which does not appear.

Thompson on Corp., Vol. 1, Sec. 315.

Am. & Eng. Enc. of Law, Vol. 6, p. 802.

There was no attempt to pass the franchises of the Martin-Alexander Lumber Company to the Detroit Timber and Lumber Company, and it could not have been done.

In the case of the Key City, 14 Wall., 653, the two companies united their stock in trade, their vessels and their barges and other property, and formed a new corporation, the corporators of which were taken exclusively from those in the two old companies.

In the case of McAlpine v. Union Pacific Ry. Co., 23 Fed., 168, it was the intention and purpose expressed in the articles between the two railroad companies to consolidate and they did consolidate. The companies are referred to as the "constituent" companies in the "Articles of Consolidation." Such are not the facts in this case. The trade had been made in all its details before Clark became possessed of any of the stock of the Martin-Alexander Lumber Company. Martin, the largest stockholder, passed out; no stock of the Detroit Timber and Lumber Company was issued to him. As appears from the resolution of the Martin-Alexander Lumber Company, the transfer of its assets to the Detroit Timber and Lumber Company was ordered before the stock of Martin in that company was ever transferred to Clark. The facts show clearly that a sale was intended and in fact made.

5. It was urged by appellant in the circuit court of appeals that the defense of bona fide purchaser had not been properly pleaded by appellee. To this we reply that no exceptions were taken to the answer, and a general replication was filed. It is therefore too late to raise the objections for the first time on appeal.

Boone v. Chiles, 10 Peters, 177.

Responding to the last point suggested by appellant in the circuit court of appeals, that in any event the Detroit Timber and Lumber Company was not a purchaser for value as regards all those entries for which it secured no deeds because it has never acquired the legal title, we desire to say that we think we have answered it by our argument in the former part of this brief, to the effect that as the Detroit Timber and Lumber Company, by its purchase became the legal owner of the timber on the land, whether the sale of the timber was made before or after the patents had been issued to the entrymen when the patents were issued, the legal title so acquired by the entrymen, in the language of the statutes of Arkansas, inured to the benefit of the entrymen's grantees.

7. In conclusion we desire to say that we feel that this transaction on the part of the Detroit Timber and Lumber Company was an honest one. It was one had in due course of trade. It was in no way connected with the entering of the land. It bought the property and paid a fair price for it, without notice of any defect

in the title. It stands before this court with clean hands. The government has been paid every dollar it asked for its land, and we do not believe that a court of equity where such a state of facts exists will find that it is its duty to take from our client this property.

Respectfully submitted,

THOMAS C. McRAE,
JAMES F. READ,
U. M. ROSE,
GEORGE B. ROSE.

APPENDIX.

Timber cut from lands to which Detroit Timber and Lumber Company had timber deeds, which was patented in 1900:

E. Winslow	534,263	ft.,	date	patented,	Aug.	9, 1900
J. C. Means	218,020	"	"	"	"	"
J. F. Patterson	596,944	"	"	"	"	"
John Scott	125,688	"	"	Feb.	24,	"
Martha Gregory	29,358	"	"	"	"	"
Robert Gregory	384,600	"	"	"	"	"
C. O. Means	118,779	"	"	"	"	"
H. Lintz	291,804	"	"	Nov.	28,	"
C. O. Means	118,779	"	"	Aug.	9,	"
	2,299,456	ft.				

Timber not cut from lands to which Detroit Timber and Lumber Company hold timber deeds, which was patented in 1900:

J. H. Scott ..... 124 acres, date patented, Feb. 24, 1900
N. G. Gregory ..... 92 " " " " " "
Martha Gregory 80 " " " " " "
H. Lintz ..... 90 " " " Nov. 28, "

386 acres.

Timber cut from lands to which Detroit Timber and Lumber Company hold timber deeds, which was patented after February 1, 1901:

Gus Copeland ..... 728,960 ft., date patented, Feb. 9, 1901
H. James ..... 92,255 " " " " " "
B. B. Copeland ..... 704,680 " " " Mar. 23, "
Emma Lintz ..... 148,028 " " " " " "

1,673,923 ft.

Timber not cut from lands to which Detroit Timber and Lumber Company hold timber deeds, which were patented after February 1, 1901:

S. Garrison ..... 160 acres, date patented, Feb. 9, 1901
B. Garrison ..... 160 " " " " " "
Emma Lintz ..... 30 " " " Mar. 23, "

350 acres.